LIBRARY
SUPREME COURT U.S.
1972

In The

SUPREME COURT OF THE UNITED STATES

No. 71-1286

TYLER INDEPENDENT SCHOOL DISTRICT ET AL.,
Petitioners,

v.

HONORABLE WILLIAM WAYNE JUSTICE, UNITED STATES JUDGE FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION,
Respondent.

Petition for Certiorari to the United States Court of Civil Appeals for the Fifth Circuit and Petition for Writ of Mandamus and/or Prohibition

MARSHALL SPIVEY,
1101 Peoples Bank Building
Tyler, Texas 75701
Attorney for Petitioners

SUBJECT INDEX

	Page
List of Authorities	ii
The Opinion Below	2
Jurisdiction of the Court	2
The Questions Presented for Review	2, 3
Statement of the Case	4
A. The Trial Court Proceedings	4, 5
B. Facts Pertinent to the Issues Presented	5
C. Decision of the Court of Appeals	5, 6
Reasons for Granting the Writ	6, 7, 8, 9, 10, 11, 12
Conclusion	12, 13, 14
Certificate of Service	15
Appendix	

LIST OF AUTHORITIES

Page

Carter vs, Seamans, (C.C.A., 5th Cir. 1969) 411 F. 2d 767 10

LaBuy vs. Howes Leather Company, (1957) 352 US 249, 256; 77 S. Ct. 309 ..... 7, 8, 10

Schlagenhauf vs. Holder (1964) 85 S. Ct. 234 ..... 8, 10

United States vs. Raymond A. O'Connor (C.C.A. 2d 1961), 291 F. 2d 520, 100 A. L.R. 2d, 858 10

Universal Oil Production Company vs. Hall, (C.C.A., 8th Cir. 1935) 76 F. 2d 258, 265; certiorari denied, 296 U.S. 261, 663; 56 S. Ct. 143, 169, 80 L. Ed. 441, 472 9

Webster Eisenlohr vs. Kalodner, (C.C.A. 3rd Cir. 1944), 145 F. 2d 316 8

In The

SUPREME COURT OF THE UNITED STATES

No. .....

TYLER INDEPENDENT SCHOOL DISTRICT ET AL.,
Petitioners,

v.

HONORABLE WILLIAM WAYNE JUSTICE, UNITED STATES JUDGE FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION,
Respondent.

Petition for Certiorari to the United States Court of Civil Appeals for the Fifth Circuit and Petition for Writ of Mandamus and/or Prohibition

---

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now Tyler Independent School District, Board of Trustees of Tyler Independent School District, J.

DONALD GUINN, E. W. CLAWATER, LEMUEL C. HUTCHINS, THOMAS SPROULE, MARTIN THEDFORD, MARTIN L. EDWARDS, and VERNON V. GOSS, as Petitioners, and pray that the Court issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit rendered on January 12, 1972, in the above styled cause, and in the alternative, issue a Writ of Mandamus and/or Prohibition.

As grounds for granting a Writ of Certiorari or, in the alternative, a Writ of Mandamus and/or Prohibition in this cause, the Petitioners would show the Court as follows:

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported and constitutes no more than an order of denial of the Petitioners' Petition for Writ of Mandamus and/or Prohibition filed in said Court.

JURISDICTION OF THE COURT

The jurisdiction of this Court is invoked under the provisions of 28 USC 1254(1) and 28 USC 165(a).

THE QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not the Court of Appeals abused its discretion in failing to grant the Petition for Writ of

Mandamus and/or Prohibition commanding the Honorable William Wayne Justice, Judge of the United States District Court for the Eastern District of Texas, Tyler Division, to vacate an Order dated December 17, 1971, and prohibiting him from entering an Order whereby the Court-appointed bi-racial committee shall become an agent or master in chancery in said proceedings.

(2) Whether or not the Order herein complained of constituted a violation of Rule 53b of the Federal Rules of Civil Procedure.

(3) Whether or not the said Honorable William Wayne Justice had the power as a District Judge to designate a bi-racial committee as an agent for the Court and to convey unto such agent the powers granted by such Order.

(4) Whether or not such Order herein complained of constituted an abuse of discretion by the said Honorable William Wayne Justice and a usurpation of power by him.

(5) Whether or not this Honorable Court should exercise its powers and grant, in its discretion, a Writ of Mandamus and/or Prohibition requiring the said Honorable William Wayne Justice to vacate said Order for the same reasons specified in the earlier application to the United States Court of Appeals for the Fifth Circuit. (Appendix A, Page A-1)

STATEMENT OF THE CASE

A. *The Trial Court Proceedings:*

Your Petitioners are the party defendants in a consolidated action instituted in the United States District Court for the Eastern District of Texas, Tyler Division, on July 8, 1971. On July 8, 1971, he Honorable William Wayne Justice, Judge of said District, duly entered an Order appointing a bi-racial committee to function as an advisory board to the school board. (Appendix B, Page B- 1 . By subsequent order dated July 15, 1971, the Court amended its order by directing the method of nominations to the bi-racial committee (Appendix C, Page C- 1 .

The Court, without hearing and without notice herein, entered its Order dated December 17, 1971, for the purported purpose of clarifying duties, responsibilities and authority of the bi-racial committee. (Appendix D, Page D- 1 .

The December 17 Order (Appendix D, Page D- 1 provided that the bi-racial committee shall be an agent of the Court and the advice and recommendation of such bi-racial committee shall serve as a basis for final action by the board or by the Court relating to matters in the above styled suit. Such order went on to provide that meetings, discussions and deliberations of the committee shall be conducted in executive session. No provisions were made for the Petitioners to hear any evidence or testimony submitted to the committee, nor to

cross-examine any of the witnesses, nor to present any testimony on their behalf. The committee was directed to review certain areas as set out in the Order but no specific problem, controversy or issues were referred to them, no such issues being in litigation at that time. The Order further provided that to fulfill its duties, the committee shall meet at least once each month.

B. *Facts Pertinent to the Issues Presented:*

(1) There were no exceptional conditions existing in the above numbered cause which warranted a reference to a master in chancery.

(2) The Order specifically provided that the bi-racial committee was to formulate its opinions and recommendations from meetings and hearings conducted outside of the presence of your Petitioners and that your Petitioners were not given the right to hear testimony, to cross-examine witnesses and to present their evidence as to any issue before the bi-racial committee.

(3) No specific areas for investigations were set out by the Order.

(4) The bi-racial committee was made up of persons who were not disinterested as required by law.

(5) Such Order was entered without notice to any of the parties or any opportunity for hearing thereon.

C. *Decision of the Court of Appeals:*

The Court of Appeals, on January 12, 1972, entered a Memorandum Order which simply denied the Peti-

tioners' application for Writ of Mandamus and/or Prohibition.

REASONS FOR GRANTING THE WRIT

The specific order herein complained of, unfortunately, does not place a designation on the bi-racial committee other than an "agent". Since the Federal Rules of Civil Procedure has no provisions for the appointment or designation of an agent of the Court, per se, it must be presumed from the similarities of power that the Court was appointing the bi-racial committee to serve as a master in chancery under the provisions of Rule 53, Federal Rules of Civil Procedure.

Based on the above assumption, such Order of reference was and is in violation of Rule 53 of the Federal Rules of Civil Procedure, for the following reasons:

A. Such reference is not required by any exceptional conditions existing in the above numbered cases.

B. The powers contained in such reference constitutes a violation of Petitioner's right to due process of law as provided in the Fourteenth Amendment to the Constitution of the United States of America in that the bi-racial committee was to formulate its opinions and recommendations from meetings and hearings conducted outside of the presence of the Petitioners with the Petitioners being given no right to hear testimony, to cross-examine witnesses and to present their evidence as to any issue before the bi-racial committee.

C. The bi-racial committee is not directed by the Order of the Court to a specific area or areas for its examination, but such direction was so broad and so general as to constitute the bi-racial committee as a quasi tribunal for investigation of problems which may or may not arise in the future, but which are not in controversy at this time.

D. The bi-racial committee is not qualified to serve as a master in chancery in that it was appointed from nominations made by parties to the cases in chief; therefore, not disinterested persons as required by law.

E. The Order further provided that the advice and recommendations of the bi-racial committee will serve as a basis for final action by the Board or by the Court, thereby giving the report of the bi-racial committee the effect of a master's report, which master's report is by law binding upon the Court unless clearly erroneous.

F. That the Order was entered without notice to any parties and without any opportunity for hearing thereon.

Since this Honorable Court has the duty to formulate the Federal Rules of Civil Procedure, it goes without saying that it has the power to enforce these rules. A particular case in point is the decision by this Court in *LaBuy vs. Howes Leather Company* (1957) 352 US 249, 256; 77 S. ct. 309, 313, wherein the Court stated:

> "As this Court pointed out, in Los Angeles Brush Manufacturing Corporation vs. James, 1927, 272

> US 701, 706; 47 S. Ct. 286, 288, 71 L. Ed. 481: '* * * (W)here the subject concerns the enforcement of the * * * (r)ules which by law it is the duty of this court to formulate and put in force, mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked.'"

This Court also recognized its right to use the discretionary writ of mandamus to bring about compliance with a rule of civil procedure in the case of *Schlagenhauf vs. Holder* (1964) 85 S. Ct. 234.

Not only did the reference to the bi-racial committee occur without the existence of exceptional conditions, *La Buy, supra.*, but the order set up the bi-racial committee as an administrative or investigative body thereby allowing the committee to function in such a capacity even though the Court itself is prohibited from functioning in an administrative or investigative capacity. *Webster Eisenlohr vs. Kalodner*, (C. C. A. 3rd Cir. 1944), 145 F. 2nd 316.

Another glaring abuse of the Court's discretion in the Order of reference was the complete denial of procedural due process guaranteed by the Constitution of the United States of America. The District Court required the bi-racial committee to hold its meetings in executive session and did not require the bi-racial committee to conduct open hearings on issues coming before them. While complying with the order of reference, the bi-racial committee could formulate an opinion and deliver a report to the District Court upon which said

Court would base its order without providing to your applicants an opportunity to be heard or to hear the witnesses appearing before the bi-racial committee. This constitutes a clear denial of procedural due process and constitutes a blatant abuse of discretion and usurpation of power by the trial court.

The very manner by which the bi-racial committee was selected emphasizes the Court's total disregard of the provisions of Rule 53, supra. Instead of an impartial person or persons to function as a master in chancery, the Court selected a committee of local citizens from a group recommended by the parties. A master in chancery's sole function is to aid the Court of his appointment; he should never serve as a servant of the litigants. *Universal Oil Production Company vs. Hall*, (C. C. A., 8th Cir. 1935) 76 F. 2d 258, 265; certiorari denied, 296 U.S. 261, 663; 56 S. Ct. 143, 169, 80 L. Ed. 441, 472.

While it is clear from the very order itself that the Trial Court abused its discretion and was guilty of unsurpation of power by failing to follow Rule 53, supra., your applicants acknowledge their burden to show this Court why the extraordinary Writ of Mandamus and Prohibition should issue in this particular cause. It has often been said that there are three basic elements which must exist in order for a Court to be justified in issuing a Writ of Mandamus. These three are (1) a clear right in the Plaintiff to the relief sought;

(2) a clear duty on the part of the Defendant to do the act in question; and (3) no other adequate remedy available. *Carter vs. Seamans*, (C. C. A., 5th Cir., 1969) 411 F. 2d 767. In regard to the third element, it is further stated that the alternative remedy must be adequate and capable of affording full relief. *Carter vs. Seamans, supra.*

It is apparently well settled that an order appointing a master in chancery, in and of itself, is not appealable. For this reason, such complaints pertaining to a master in chancery have consistently been attacked by petitions for Writ of Mandamus and/or Prohibition. *U. S. vs. Raymond A. O'Connor* (C. C. A. 2d Cir. 1961) 291 F. 2d 520, 100 A. L. R. 2d, 858.

In both the *LaBuy vs. Howes Leather Company, supra*, and *Schlagenhaud vs. Holder, supra*, this Court, in the exercise of its discretion, chose to issue the extraordinary Writ of Mandamus in order to insure compliance with its own rules of civil procedure. The *LaBuy case, supra*, is particularly appropriate in that it involved the reference to a master in chancery wherein this Court found that the required exceptional conditions were not present.

In the case in chief, the District Court has presided over the integration of the Tyler Independent School District and has more familiarity with the related problems than any other individual or individuals. Your applicants do not quarrel with the right of the District

Court to appoint a bi-racial committee as a tool to assist in the community in solving its problems relating to its school system. However, this is not what the District Court has done. By the December 17 Order, the bi-racial committee became an extension of the Court with power far beyond an advisory committee: Controversies which arise in the future can well be decided by action of the committee without the benefit of the judicial process. A party aggrieved by an Order based on the recommendation of the bi-racial committee will be forced to accept same without ever being heard, or be relegated to an expensive appeal with a limited record at best.

The foregoing relates also the final requirement of an adequate remedy. Although it is clear that the District Court has abused its discretion and has been guilty of a usurpation of power, your applicants realize they have the burden of convincing this Court it is necessary to grant the relief herein prayed for. When the circumstances are examined from a practical point of view, your applicants find themselves in a position where their every action is subject to the scrutiny of a committee of laymen without the benefit of due process. With the powers conferred by the December 17th Order, this committee can substitute its opinions for those of the School District and Board of Trustees. The State of Texas provides that the schools are to be managed by duly elected officials subject, of course, to judicial review. By no means should a group of laymen

chosen, in effect, by adversaries be allowed to take over the management of the Tyler Independent School system. Unfortunately, if the December 17th Order is allowed to continue in effect, such would be the case.

CONCLUSION

It is anticipated that the opponents to the application will attempt to make a civil rights case out of the matter. However, such is plainly not the case. Even in a case where such extraordinary circumstances exist that warrants a reference to a master, the least that should be required is that such reference follow the rules set by this Court so that the parties are afforded due process and thus given the opportunity for justice to prevail. Such is not the case in this cause. The fact that the District Court has chosen to disregard the specific instruction of this Court and the established law pertaining to master in chancery, is plain on the face of the Order itself. Regardless of what the Trial Judge intended, his Order created a quasi judicial entity which has more power in the administrative and investigate areas than the Court itself. The net effect of such Order is to remove the Board of Trustees as the head of the School District and substitute a group of laymen who are not responsible to people of the School District or the State of Texas. Neither Congress nor this Court has approved this manner of control. The preceding statements are the real issue in the case and the sole reason for this application. Unless

this Court exercises its discretion and grants the Writ herein requested, a District Court Order will be allowed to stand which ignores this Court's rules and the well established case law; however, the real harm will be to the citizens of Tyler, Texas, who have been deprived of their control of the school system by this improper and erroneous Order.

Insignificant as this case may seem at first blush, when compared with monumental cases pending before this Honorable Court, the issues herein presented can have far reaching effect on our whole system of Government. To allow the Order to stand by refusing this Application, will be the same as giving silent approval to a method whereby a District Court can, through an agent, review and control duly elected officials and a political subdivision of a State, not for alleged misconduct or failure to follow the law of the land, but merely because they might not follow the wish of the Trial Judge or special inferest group.

Normally, the reasons given by Courts in appointing bi-racial committees are to assist the various elements of the community in harmoniously working toward an integrated school system. As this Court well knows, there are a great many ways and methods of attempting this—some reasonable and some unreasonable—some work harmoniously—some create great disunity and disruption. The Courts have at best a very delicate problem. To allow a bi-racial committee to assume the

erroneous power given it by this Court, even if it were constitutional (which is vigorously denied) would invariably substitute the Judgment of the Committee for that of the duly elected school officials. It in effect prejudges the action of the duly elected officials and assumes that whenever an issue occurs that the elected officials will improperly decide it.

Therefore, for the foregoing reasons, it is prayed that this Petition for Writ of Certiorari and in the alternative, the Application for Writ of Mandamus and/or Prohibition be granted and that upon final hearing, the Judgment of the Court of Appeals be reversed and that the Writ of Mandamus thereof be issued by this Honorable Court.

Respectfully Submitted,

WILSON, MILLER, SPIVEY,
SHEEHY and KNOWLES

By: Marshall Spivey
Marshall Spivey

CERTIFICATE OF SERVICE

I certify that three copies each of the foregoing Petition for Certiorari to the United States Court of Appeals For the Fifth Circuit and Petition for Writ of Mandamus and/or Prohibition were served upon The Honorable William Wayne Justice, Judge of the United States District Court for the Eastern District of Texas, Tyler Division, Federal Building, Tyler, Texas 75701; Mr. Ken T. Miller, Bryant Petroleum Building, Tyler, Texas 75701; Attorney for Curtis Dunn et al; and Mr. Roby Hadden, United States Department of Justice Federal Building, Tyler, Texas 75701, by placing the same in the United States Mail, properly addressed and postage prepaid, on this the 6th day of April, 1972.

Marshall Spivey

APPENDIX A

U.S. COURT OF APPEALS
FILED
Jan. 12 ,72
EDWARD W. WADSWORTH
CLERK

In The

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-1006

TYLER INDEPENDENT SCHOOL DISTRICT, ET AL.,
Petitioners,

versus

HONORABLE WILLIAM WAYNE JUSTICE, UNITED STATES JUDGE FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION,
Respondent.

Appeal from the United States District Court for the Eastern District of Texas.

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus filed in the above styled and numbered cause is hereby denied.

APPENDIX B

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUL 8 1971
JAMES R. COONEY, CLERK

In the

UNITED STATES COURT OF APPEALS

FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CIVIL ACTION NO. 5176

UNITED STATES OF AMERICA

v.

TYLER INDEPENDENT SCHOOL DISTRICT, ET AL.,

MEMORANDUM OPINION AND ORDER

On April 12, 1971, plaintiff filed a motion for supplemental relief in this case. In their motion the United States asked the Court to supplement the July 21, 1970 order of this court in this case by (1) requiring the maintenance of all activities, curricular and extra-curricular, on a non-segregated and otherwise non-discriminatory basis and (2) requiring the establishment of a bi-racial committee charged with the responsibility of reviewing the operations of the school district relevant to the achievement of a unitary school system.

A TRUE COPY I CERTIFY
JAMES R. COONEY, CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
By Joyce Almaraz

The hearing on this motion was consolidated pursuant to Rule 42(a) of the Federal Rules of Civil Procedure with the hearing on a motion for preliminary injunction in the case of *Dunn, et al. v. Tyler Independent School District, et al.*, Civil Action No. 5285 (E. D. Tex.) inasmuch as common issues of fact were raised in each motion.

The factual setting for this motion is set forth in the recent opinion of May 27, 1971 in the *Dunn* case. Evidence at the hearing indicated that upon the closing of Scott High School, pursuant to this court's order of July 27, 1970 (as modified on August 10, 1970), distinctions between the former Scott students reassigned to Tyler High School and white students who traditionally attend Tyler have been expressed in both the feelings and actions of the students and school officials. Consequently, there was an increasing dichotomy between some black students and some white students and faculty during the school year.

It was in this context that a cheerleader election was held at Tyler High School on March 23, 1971.[1] The ballot prepared for this election listed four black candidates separately from ten white candidates and instructed the students to vote for four white and two black students. While this type of election insured

[1]During the 1970-71 school year the cheerleading squad at Tyler High School consisted of six whites and three blacks. The black cheerleaders, who had been appointed to the Scott cheerleading team prior to the court order of July 27, 1970 were added to the Tyler squad upon their reassignment to Tyler in September 1970.

black representation on the cheerleading squad, the racial distinction on the ballot reemphasized the dichotomy between the former Scott students and the "Tyler" students and increased the already existing tensions arising from this dichotomy. The facts surrounding the student protest and the suspensions arising from this protest have already been set forth in the *Dunn* opinion of May 27, 1971.

Defendant school district has not opposed the requested amendment to this court's earlier orders in this case as it pertains to extracurricular activities. Objection has been raised, however, to the formation of a bi-racial committee on the grounds that such a committee would serve no useful function. Yet, the testimony at the joint hearing on this motion and the motion in the *Dunn* case consistently shows a lack of communication between the black and white community in adjusting to the transition from a dual to unitary system.

The need for a bi-racial committee to facilitate in the resolution of the present disagreement is more than clear in this situation. The mere fact that a dispute arising out of a cheerleader election has been brought before the federal courts speaks loudly of the need for some mechanism wherein issues affecting the conversion of the school district to a unitary system can be brought out, discussed, and, hopefully, resolved without need for litigation. The advisability of establishing bi-racial committees has been clearly stated by the

Fifth Circuit Court of Appeals. *Ellis* v. *Board of Public Instruction of Orange County*, 423 F. 2d 203 (5th Cir. 1970); *United States* v. *Hinds County School Board*, 417 F. 2d 852 (5th Cir. 1970); *Singleton* v. *Jackson Municipal School District*, 426 F. 2d 1364 (5th Cir. 1970); *Hightower* v. *West*, 430 F. 2d 552 (5th Cir. 1970); *Davis and United States* v. *Mobile County*, 432 F. 2d 883 (5th Cir. 1970). In requiring the formation of such a committee in *Valley* v. *Rapides Parish School Board*, 313 F. Supp. 1193, 1206 (W.D. La. 1970) the district court observed that to many black students, there appears to be an "inability of the white man, even faintly, to comprehend what gnaws at the heart and soul of the black man, but [that] this coin has two sides and often black people cannot comprehend that whites also experience frustration and injustice. Communication between the races is difficult on today's market. That is why it is so important that a bi-racial committee be activated." This committee can be "charged with the responsibility of investigating, consulting and advising with the school board periodically with respect to all matters tending to promote a unitary system . . ." *Id.* at 1206.

More recently, Judge Scott, in the case of *Monteilh, et al.* v. *St. Landry Parish School Board*, C.A. No. 10,912 (W.D. La. March 25, 1971) created a bi-racial committee in order to:

(1) Insure adequate and impartial investigation and responsible recommendations on such

racially oriented problems as may be referred to it;

(2) Create an avenue of communication between the Black and White elements of the community regarding the solution of such problems;

(3) Afford local citizens an effective means of settling and solving the problems of their own schools through their own efforts rather than through the adversary machinery and in the controversial atmosphere of the Courts; and

(4) Promote an environment of understanding and common purpose between the Black and White elements of the community so that a superior public school system may continue to function in St. Landry Parish, Louisiana.

The duty to achieve the goal of raceless public schools and the burden of obtaining such is on school boards, either alone or in conjunction with cooperative efforts of parent organizations, bi-racial committees or other similar groups, and the burden of obtaining such end should not be placed on the judiciary. *United States* v. *Board of Education of the City of Bessemer*, 396 F. 2d 44 (5th Cir. 1969), appeal after remand, 417 F. 2d 46 (1970). That a school board be required to have the benefit of community and school committees to assist in the affirmative transition to a unitary school system is not unreasonable.

Therefore, it is hereby ORDERED, ADJUSTED and DECREED that:

1. Defendant school board is hereby enjoined from maintaining and conducting all activities, curricular and extracurricular, on a segregated or otherwise discriminatory basis, so that no student is effectively excluded from attending or participating in any school activity on the basis of race, color or national origin.

2. A bi-racial committee shall be established consisting of sixteen persons, composed of an equal number of black and white persons. Sixteen nominations shall be submitted to the Court by plaintiffs in the *Dunn* case and sixteen nominations shall be submitted by the school board. These submissions shall contain pertinent information about the background of each nominee, including race, age, educational background, number of children in the school system, employment and community organizations to which he or she belongs. The members of the bi-racial committee shall be representative of a cross-section of the Tyler community.

After the committee is appointed, they shall select a chairman. The chairman shall alternate annually between a black and white chairman. Each member shall be appointed for a two year term, and shall be eligible for re-appointment. In the event of a vacancy created by an expired term, death, disability, resignation or removal by the court for cause, such vacancy shall be filled by a person of the same race as the member he or she is replacing.

The bi-racial committee shall be charged with the responsibility for discussing ways and means of achieving inter-racial harmony and understanding among students, teachers, and patrons, and shall function as an advisory body to the school board. The committee shall review all areas of school operation relevant to the achievement of a unitary school system, and shall investigate and review any complaint directed to them concerning this operation. They shall advise the school board of their findings and conclusions.

3. Upon its appointment, the bi-racial committee shall investigate and review the cheerleader election at Tyler High School and make a report to the school board with findings and conclusions as to the most equitable means of resolving this dispute.

4. By not later than August 15, 1971, the school board shall report to the court their recommendations for resolving the cheerleading dispute, including in the report recommendations made by the bi-racial committee. The court shall give substantial weight to the findings and conclusions of the bi-racial committee in resolving the dispute, and in resolving further problems which might be brought to its attention regarding the operation of the Tyler School System.

SIGNED and ENTERED this 8th day of July, 1971.

Wm. Wayne Justice
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUL 15 1971
JAMES R. COONEY, CLERK
BY JOYCE ALMARAZ
DEPUTY

In The

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CIVIL ACTION NO. 5176

UNITED STATES OF AMERICA

v.

TYLER INDEPENDENT SCHOOL DISTRICT, ET AL,

AMENDMENT OF ORDER ENTERED JULY 8, 1971

The Order of the Court dated July 8, 1971, is hereby amended as follows:

The sixteen (16) nominations submitted to the Court by the Plaintiffs in the *Dunn Case* shall be composed of eight (8) white and eight (8) black nominees.

The sixteen (16) nominations submitted to the Court by the School Board shall be composed of eight (8) white and eight (8) black nominees.

The nominations by the Plaintiffs in the *Dunn Case* and the nominations by the School Board shall be submitted to the Court not later than July 23, 1971.

Except as herein amended the Order of the Court dated July 8, 1971, shall in all respects remain the same.

SIGNED and ENTERED this 15th day of July, 1971.

Original Signed by Wm. Wayne Justice

JUDGE, UNITED STATES DISTRICT COURT

A TRUE COPY I CERTIFY
JAMES R. COONEY, CLERK
EASTERN DISTRICT, TEXAS
DEPUTY JOYCE ALMARAZ

APPENDIX D

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
DEC 17 1971
JAMES R. COONEY, CLERK
BY MYRA BARTON
DEPUTY

In The

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CIVIL ACTION NO. 5176

UNITED STATES OF AMERICA

v.

TYLER INDEPENDENT SCHOOL DISTRICT, ET AL,

CIVIL ACTION NO. 5285

CURTIS DUNN, ET AL,

v.

TYLER INDEPENDENT SCHOOL DISTRICT, ET AL,

ORDER CLARIFYING DUTIES, RESPONSIBILITIES AND AUTHORITY OF BI-RACIAL COMMITTEE

On November 19, 1971, this court received a letter from Chairman James C. Wynne, Jr., on behalf of his

A TRUE COPY I CERTIFY
JAMES R. COONEY, CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
BY MYRA BARTON
DEPUTY

committee, requesting additional clarification of the duties and responsibilities of the Bi-Racial Committee ordered by the court on July 8, 1971, and appointed on August 3, 1971. In response to that letter, the following additional guidelines are provided and compliance ORDERED:

1. The Bi-Racial Committee shall no longer be exclusively an advisory body to the Board of Education and administration of the Tyler Independent School District, but is charged with the responsibility of acting as an agent of this court to advise and make recommendations to the court in the transition of the District to a unitary status.

2. The Committee shall carefully review the following areas, which the Supreme Court has ruled may reflect the racial policies and practices of a school system: (1) faculty and staff, (2) transportation of students, (3) extracurricular activities, (4) school facilities, and (5) student assignments. Other areas which may appear relevant from time to time or may be referred to them by the court or the Board of Education may also be reviewed.

3. Meetings, discussions and deliberations of the Committee shall be conducted in executive session; and its recommendations to the court on any matters coming before it shall be considered privileged and not released to the press or otherwise made public except through the orders of this court.

4. The Committee may receive referrals or complaints from the school administration or Board of Education, the court, or individual citizens in the community. They are authorized to hold hearings and conduct public meetings from time to time as they deem necessary. In investigating com-

plaints, they are encouraged to take advantage of existing grievance procedures.

5. In order to fulfill its duties, the Committee shall meet at least once each month and shall make formal reports to this court and the Board of Education at least once each quarter.

6. The Committee shall adopt its own rules of procedure to govern its meetings where not specified in this and prior orders. By-laws shall be filed with the court and with the Board of Education.

It is further ORDERED that the Board of Education of the Tyler Independent School District, the Superintendent of Schools, all other officials, teachers, agents and employees of the District, and all other persons acting in concert with them, cooperate fully with the Committee to effectuate its purposes and objectives. To this end, the Board shall designate not less than one nor more than three persons, who shall be members of the Board of Education or members of the administrative staff of the Tyler Independent School District, to act as liasion between the Bi-Racial Committee and Board of Education, and to attend the meetings of the Bi-Racial Committee when requested to do so by the Committee.

The Community Relations Service (CRS), Department of Justice, by and through its Regional Director, Mr. Larry Ramirez, 1100 Commerce Street, Dallas, Texas 75202, is hereby requested by the court to meet with the Committee within 15 days after the date of

this order to assist in its restructuring and additional organization.

The Court believes that the Bi-Racial Committee will provide a valuable and necessary service to the court and to the Board of Education, and more importantly, to the school children and parents of the Tyler Independent School District. It is not the purpose of the Committee to supersede the Board. Its advice and recommendations, reached objectively and in a non-partisan manner, will serve, however, as a basis for final action by the Board or by the Court in matters relating to the desegregation process.

Let the foregoing be served upon the Tyler Independent School District School Board, by and through its President, Lemuel Hutchins, and upon the Superintendent of Schools, James Plyler, members of the Bi-Racial Committee, and all other parties through their attorneys of record, by certified mail.

SIGNED and ENTERED this 17th day of December, 1971.

Wm. Wayne Justice
UNITED STATES DISTRICT JUDGE

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

No. 71-1286

TYLER INDEPENDENT SCHOOL DISTRICT, ET AL.,
Petitioners,

versus

HONORABLE WILLIAM WAYNE JUSTICE, UNITED STATES JUDGE FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CIVIL APPEALS FOR THE FIFTH CIRCUIT AND PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION.

Ken T. Miller,
601 Bryant Petroleum Building,
Tyler, Texas 75701

Sam Houston Clinton, Jr.
600 West 7th Street
Austin, Texas 78701

Attorneys for Respondent

SUBJECT INDEX

	Page
List of Authorities	i
The Opinion Below	2
Jurisdiction of the Court	2
The Questions Presented for Review	2
Statement of the Case	2
A. The Trial Court Proceedings	2, 3
B. Facts Pertinent to the Issues Presented	3-8
C. Decision of the Court of Appeals	8
Reasons for Refusing to Grant Writ	8-12
Conclusion	12, 13
Certificate of Service	14

LIST OF AUTHORITIES

Davis and United States v. Mobile County, 432 F. 2d 833 (5th Cir. 1970)	9
Ellis v. Board of Public Instruction of Orange County, 423 F. 2d 203 (5th Cir. 1970)	8
Hightower v. West, 430 F. 2d 552 (5th Cir. 1970)	8
Singleton v. Jackson Municipal School District, 426 F. 2d 1364 (5th Cir. 1970)	8
United States v. Hinds County School Board, 417 F. 2d 852 (5th Cir. 1970)	8

IN THE
SUPREME COURT OF THE UNITED STATES

No.

TYLER INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

versus

HONORABLE WILLIAM WAYNE JUSTICE, UNITED STATES JUDGE FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CIVIL APPEALS FOR THE FIFTH CIRCUIT AND PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Come now CURTIS DUNN, Next Friend of ROBERT DUNN and RONALD DUNN, Minors; LOYCE E. ALLEN, Next Friend of REGINALD D. ALLEN, A Minor; For themselves and all others similarly situated, as Respondents, and pray that the Court refuse to issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit,

rendered on January 12, 1972, in the above styled cause, and refuse to issue a Writ of Mandamus and/or Prohibition.

As grounds for refusing to grant a Writ of Certiorari and for refusing to grant a Writ of Mandamus and/or Prohibition in this cause, the Respondents would show the Court as follows:

THE OPINION BELOW

The United States Court of Appeals for the Fifth Circuit denied the Petitioners' Petition for a Writ of Mandamus and/or Prohibition. This Opinion was not reported.

JURISDICTION OF THE COURT

The jurisdiction of this Court is invoked under the provisions of 28 USC 1254 (1) and 28 USC 1651 (2).

THE QUESTIONS PRESENTED FOR REVIEW

The Respondents state that there are no questions presented for review to the Supreme Court. Respondents state that the District Court was correct in appointing the bi-racial committee and giving the committee the powers stated in the District Court's Order.

STATEMENT OF THE CASE

A. The Trial Court Proceedings:

Respondents adopt the first two paragraphs of the Petitioners' Statement of the Case under trial court proceedings, but state that Paragraph III is not en-

tirely correct. The December 7 Order which is shown in Appendix D, Page D-1 of the Petitioners' Brief provided that the bi-racial committee shall be an agent of the Court and the advice and recommendation of such bi-racial committee shall serve as a basis for final action by the board or by the Court relating to matters in the above styled suit. The Order provided that the meetings, discussions and deliberations of the committee shall be conducted in executive session. However, the Court did state that the committee shall adopt its own rules of procedure to govern its meetings, and this was not specified in this and prior orders. The by-laws shall be filed with the Court and with the Board of Education. The Order further provided that the committee was authorized to hold hearings and to conduct public meetings from time to time as they deem necessary. The Respondents would take this to mean that the committee was authorized to hear evidence or testimony submitted to the committee, to allow cross examination of the witnesses by the committee and also for witnesses to present testimony on their behalf. The other portions of Part A of Petitioners' Brief are correct.

B. Facts Pertinent to the Issues Presented:

(1) Respondents disagree with Petitioners that there are no exceptional conditions existing in the above numbered cause which warranted a reference to a master in chancery. The Court did not mention a master in chancery, but only appointed the committee both as an advisory body to the Board of Education and the administration of the Tyler Independent

School District, and also charged it with the responsibility of acting as an agent to the District Court to advise and make recommendations to the Court in the transition of the district to a unitary status.

There has been conflict at both senior high schools in Tyler since the integration order was signed by the District Court. To begin, Emmett Scott, the all black high school, was closed by Court Order. Part of the black students were sent to John Tyler High School and the remaining black students were sent to Robert E. Lee High School. The first sign of real trouble occurred when some 250 to 300 black students walked out after a cheerleader election which was held at John Tyler High School. A suit was filed in the United States District Court for the Eastern District of Texas, Tyler Division, after the School Board refused to discuss the matter with a group of parents. The United States District Court for the Eastern District of Texas, Tyler Division, issued a Temporary Restraining Order and later, a Preliminary Injunction, which prohibited the school officials from taking disciplinary action against the students who walked out, and ordered the immediate readmission of the black students. This controversy arose after the school officials presented a ballot which contained the words "Black" over a list of black students, and the word "White" over a list of white students. This was challenged by a group of black students. However, the election was held and the students protested by having a sit-in around the flag pole. It was after this incident that occurred at John Tyler High School that the Justice Department, through one of its attorneys, Joe Rich, filed a Motion with the Dis-

trict Court to appoint a bi-racial committee for the Tyler Independent School District.

The Honorable William Wayne Justice, United States Judge for the Eastern District of Texas, Tyler Division, ordered the Plaintiffs in the John Tyler cheerleader case to submit nominations for the bi-racial committee and also ordered the School Board to submit nominations. There was some discussion among the parties as to how many blacks and how many whites would be nominated. This was clarified by an Order of the Court, whereby the Court ordered each side to nominate eight (8) whites and eight (8) black nominees. There was no opposition as to the structure of the committee by the School Board. However, the School Board did oppose the appointment of this bi-racial committee and each member of the School Board filed an affidavit stating his opposition to the appointment of such a committee.

Later, another controversy arose at Robert E. Lee High School over the use of Confederate symbols and symbolism at the high school. A group of black students protested the use of the Confederate flag, the singing of "Dixie", the use of the word "Rebel" as a team name, and the use of the drill name, the "Rebelettes", and for use of other Confederate symbols. The School Board refused to act on this matter. However, the School Board did appoint three committees to study the symbolism issue. A student, parent and faculty bi-racial committee studied the matter and all three committees voted to abolish the use of the Confederate flag as a school flag, the use of a Confederate

cannon, the use of "Dixie" as a school fight song, the school colors of red and white, and the Rebel mascot. However, when this was referred to the School Board, the issue was tabled.

Later, a group of black students petitioned the Commissioner of Education of the State of Texas and asked the Commissioner to withdraw certain funds from the school district if these symbolisms were not abolished. After a study by the Texas Education Agency and a recommendation by the agency to abolish the symbolisms, the School Board voted to abolish the symbolisms. This occurred after the violence erupted on the campus between the white and black students. The incident was investigated by the Grand Jury and the Grand Jury referred to the incident as a "riot". However, the police were called to the campus and there were numerous fights among black and white students. The Grand Jury blamed the trouble on black militants, but there were white as well as black students involved in the fracas.

With these factors in mind, certainly it cannot be said that there are no exceptional conditions existing in the Tyler Independent School District which would make it unnecessary to appoint a bi-racial committee.

(2) It is true that the District Court's Order did not provide that the School Board would be allowed to hear testimony, to cross examine witnesses and to present their evidence as to any issue before the bi-racial committee. The bi-racial committee was appointed by the Court to investigate matters before they

reached the School Board level. The bi-racial committee was also appointed to act as an agent for the Court to advise and make recommendations to the Court in assisting the transition of the district to a unitary status. If the Court allowed the School Board to intervene, this would destroy the purpose of the bi-racial committee.

(3) It is true that there were specific areas that the committee was ordered to review. The committee was ordered to carefully review (1) faculty and staff, (2) transportation of students, (3) extracurricular activities, (4) school facilities, and (5) student assignments. The Court said that other areas may appear relevant from time to time or may be referred to the committee by the Court or by the Board of Education.

(4) The bi-racial committee was made up of persons appointed by both the black community and the School Board. What the School Board means by disinterested persons is unclear, but none of the plaintiffs in the *Dunn* case were appointed to the committee and the nominations were made by a group of black people. Thirty-two (32) names were submitted to the Court when the Court made the final decision as to whom would serve on the committee. Certainly, this is a fair method for selection of a bi-racial committee. In some instances, in other states, bi-racial committees were appointed by the Court without nominations.

(5) A hearing was held in the District Court for the Eastern District of Texas, Tyler Division, concerning the appointment of a bi-racial committee. This

hearing was held in conjunction with the *Dunn* case. Testimony was offered by the Government, and testimony was offered by the School Board. The School Board presented opposition to the appointment of the bi-racial committee and was given every opportunity to present witnesses concerning this matter. There was no hearing held on the Supplemental Order which was issued by the Court on December 17, 1971, but this Order was only issued to clarify some of the questions that had been asked by the bi-racial committee.

C. Decision of the Court of Appeals:

The Court of Appeals on January 12, 1972, entered a Memorandum Order which denied the Petitioners' Application for a Writ of Mandamus and/or Prohibition.

REASONS FOR REFUSING TO GRANT WRIT

The Petitioners are incorrect in their presumption that the Court was appointing a bi-racial committee to serve as a master in chancery under the provisions of Rule 53, Federal Rules of Civil Procedure. The advisability of establishing bi-racial committees has been clearly stated by the Fifth Circuit Court of Appeals. It has also been approved by other Circuit Courts. The cases approving bi-racial committees are: *Ellis v. Board of Public Instruction of Orange County*, 423 F. 2d 203 (5th Cir. 1970); *United States v. Hinds County School Board*, 417 F. 2d 852 (5th Cir. 1970); *Singleton v. Jackson Municipal School District*, 426 F. 2d 1364 (5th Cir. 1970); *Hightower v. West*, 430 F. 2d 552 (5th

Cir. 1970); *Davis and United States v. Mobile County*, 432 F. 2d 833 (5th Cir. 1970). All these cases contain quotes explaining why the bi-racial committees are important. These cases state that communication between the races is difficult and the cases point out that there are other difficulties to be encountered in changing a formerly segregated school district to a unitary school system. These committees were charged with the responsibility of investigating, consulting and advising with the School Board periodically with respect to all matters tending to promote desegregation.

Certainly, with the attitude of the School Board, which has been brought out in the *Dunn* case, and the attitude of the School Board in handling the first recommendation of the bi-racial committee which was to add an additional cheerleader to the cheerleaders at John Tyler High School, there is much need and much work ahead for a bi-racial committee in the City of Tyler. Petitioners state that there are no exceptional circumstances existing in the above numbered cases. However, the statement is characteristic of the propensity of the School Board to brush aside events that necessitate action by the Court in the first place, including the cheerleader incident and the trouble at Robert E. Lee High School.

Respondents cannot see the reasoning of Petitioners in stating that they should have the right to hear testimony, to cross examine witnesses and to present their evidence to any issue before the bi-racial committee. In the Order issued by the District Court on

December 17, 1972, the Court ordered the School Board to designate not less than one nor more than three persons of the School Board or members of the administrative staff of the Tyler Independent School District to act as a liaison between the bi-racial committee and the Board of Education and to attend the meetings of the bi-racial committee when requested to do so by the committee. To allow the School Board to present testimony at any committee meeting and to cross examine witnesses would turn the bi-racial committee meetings into a quasi-legal proceeding. As stated by the Court, it is not the purpose of the committee to supercede the Board, but to give its advice and recommendations reached objectively in a non-partisan manner which would serve as the basis for final action by the Board or by the Court in matters relating to desegregation process. There are no powers given to the bi-racial committee to approve bond issues, to approve new buildings for the school system, to approve or disapprove the hiring or firing of teachers, or to interfere in any way with the normal orderly process of running a school system. The bi-racial committee was appointed to look into desegregation matters and into matters which would promote the orderly process of converting Tyler Independent School District into a unitary system.

The Petitioners are erroneous in stating that the Court did not set out specific areas for examination. There is no way that the Court could anticipate every problem that might arise. The Court did set out five areas which have been stated above for the bi-racial committee to examine. To narrow the scope of the bi-

racial committee would be to destroy the purpose of the bi-racial committee.

The bi-racial committee was not appointed to serve as a master in chancery, but was appointed by the Court to act as an investigative arm of the Court and to assist the Court in making decisions concerning the conversion of the school system into a unitary system.

The bi-racial committee also is to serve as an advisory body to the Board of Education and administration of the Tyler Independent School District. It is also charged with the responsibility of acting as an agent of the Court to advise and make recommendations to the Court in the transition of the district to a unitary status. The bi-racial committee's report does not have the effect of a master's report and the Petitioners are erroneous in this assumption.

How the Petitioners can say that this Order was issued without notice to them seems somewhat ridiculous. A complete hearing was held before the District Court and both parties were allowed to present evidence in support and in opposition of the bi-racial committee. The School Board had every opportunity to appeal the Order of the District Court in appointing the original bi-racial committee. However, it was not until later that the Court issued a Supplemental Order that the School Board decided to appeal the Order of the Court appointing the bi-racial committee.

Considering the conflict, opposition to integration of the school system, the violence at Robert E. Lee High

School, and the violence at John Tyler High School following the cheerleader election, certainly it is not unreasonable for the District Court to require the bi-racial committee to meet in executive session and not hold open meetings. This does not say that the bi-racial committee cannot call witnesses. Also, the Order does provide that the bi-racial committee is also authorized to hold hearings and conduct public meetings from time to time as the committee deems necessary.

The School Board raised the question that every action taken by the School Board will be scrutinized by the bi-racial committee. However, it is very clear from the Court's Order that the bi-racial committee is to advise the Court and make recommendations to the Court only in the areas set forth by the Court and only in matters concerning desegregation of the school system and only in the transition of the district to a unitary status.

CONCLUSION

It is clear from the prior actions of the Tyler Independent School District Board of Trustees that the school system will fight every effort of the United States District Court for the Eastern District of Texas, Tyler Division, to change the district to a unitary status. First, it was necessary to order the Tyler Independent School District to desegregate its classes. Second, the Tyler Independent School District has appealed every action of the United States District Court except the desegregation order. Third, it is clear from a study of the affidavits filed by the members of the

Tyler Independent School District Board of Trustees that each member opposes a bi-racial committee. Lastly, it is clear that the Board of Trustees will oppose any effort by the District Court to promote a unitary school system. This is evident from the fact that the Board will not follow recommendations of its own committees that recommended the Confederate symbols be abolished.

It would be a blow to the efforts of all parties who have tried to change the Tyler Independent School District to a unitary system for the Court to issue a Writ of Certiorari or in the alternative to grant an Application for a Writ of Mandamus and/or Prohibition. If this were done, the efforts of all parties to desegregate the Tyler Independent School District would be set back fifty years.

The Respondents pray that the Supreme Court refuse to grant the Petition for Writ of Certiorari and deny the Application for Writ of Mandamus and/or Prohibition.

Respectfully submitted,

KEN T. MILLER
601 Bryant Petroleum Building
Tyler, Texas 75701

SAM HOUSTON CLINTON, JR.
600 West 7th Street
Austin, Texas 78701

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Brief for Respondent in opposition to Petitioners' Petition for Certiorari and Petition for Writ of Mandamus and/or Prohibition was delivered by United States mail, postage prepaid, properly addressed, to Mr. Marshall Spivey, 1101 Peoples Bank Building, Tyler, Texas, 75701, attorney for Petitioners, on this____ day of May, 1972.

_____

KEN T. MILLER

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUN 2 1972

No. 71-1286

In the Supreme Court of the United States

OCTOBER TERM, 1971

TYLER INDEPENDENT SCHOOL DISTRICT, ET AL.,
PETITIONERS

v.

HONORABLE WILLIAM WAYNE JUSTICE, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND ALTERNATIVE PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

DAVID L. NORMAN,
Assistant Attorney General,

JOSEPH D. RICH,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1286

TYLER INDEPENDENT SCHOOL DISTRICT, ET AL., PETITIONERS

v.

HONORABLE WILLIAM WAYNE JUSTICE, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND ALTERNATIVE PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. Petitioners seek review of the court of appeals' denial of their petition for a writ of mandamus or prohibition against the respondent district judge requiring him to vacate an order clarifying the duties, responsibilities, and authority of a bi-racial commit-

tee. The judge had entered this order in a school desegregation case brought by the United States under Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6. *United States* v. *Tyler Independent School District*, C.A. No. 5176 (E.D. Texas, order entered December 17, 1971) (Pet. App. D-1).

The bi-racial committee had been established pursuant to a Memorandum Opinion and Order entered by the district court on July 8, 1971, after a hearing [1] on a motion for supplemental relief by the United States (Pet. App. B-1). The district court entered subsequent orders with regard to the bi-racial committee: the order of July 15, 1971 (Pet. App. C-1) specified the manner of nominating members; the order of August 3, 1971, appointed the committee members; and the order of August 25, 1971, approved recommendations by the bi-racial committee and the school board regarding resolution of the cheerleader election dispute involved in the *Dunn* case, note 1, *supra*. The district court entered its order of Decem-

---

[1] The court consolidated the hearing on the United States' motion with a hearing on a motion for a preliminary injunction in *Dunn* v. *Tyler Independent School District*, C.A. No. 5285 (E.D. Texas). The *Dunn* case was brought on behalf of a group of black students who had been suspended from the Tyler High School after protesting a cheerleader election held at the school. On May 27, 1971, the district court found that these students had been improperly dismissed by the school board and ordered the students reinstated. 327 F. Supp. 528 (E.D. Tex.). The court of appeals reversed in part and affirmed in part; the district court's order was reinstated in part for other reasons. *Dunn* v. *Tyler ISD*, No. 71-2395 (C.A. 5, April 11, 1972).

ber 17, 1971, which petitioners here seek to have vacated, in response to a letter from the Chairman of the Bi-racial Committee requesting clarification of that committee's duties and responsibilities. Petitioners did not appeal any of the above orders.

2. The court of appeals properly denied the petition for a writ of mandamus or prohibition because the order petitioners seek to have vacated was reviewable by appeal pursuant to 28 U.S.C. 1292(a)(1) as an order modifying an injunction. Mandamus or prohibition "may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute." *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26.

3. Moreover, the order of December 17, 1971, was not an abuse of the district court's power nor "so palpably improper as to place it beyond the scope" of the Rules of Civil Procedure. *La Buy* v. *Howes Leather Company*, 352 U.S. 249, 256. District courts have broad discretion in fashioning remedies to convert formerly dual school systems to unitary systems free of discrimination. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16; *Green* v. *County School Board*, 391 U.S. 430. The establishment of bi-racial committees to assist school boards and district courts in meeting the problems that arise during the transition from a dual to a unitary system has consistently been approved by the Fifth Circuit. *Ellis* v. *Board of Public Instruction of Orange County*, 423 F. 2d 203, 206; *Singleton* v. *Jackson Municipal Separate School District*, 426 F. 2d 1364, 1370; *Smith*

v. *St. Tammany Parish School Board*, 316 F. Supp. 1174 (E.D. La.), affirmed, 448 F. 2d 414. Contrary to petitioners' suggestion, the bi-racial committee is not the equivalent of a master appointed under "a deliberate policy in open defiance" of Rule 53, Federal Rules of Civil Procedure, see *Will* v. *United States*, 389 U.S. 90, 102. The provisions of the December 17, 1971, order show that the committee's function is to provide advice and recommendations to the petitioner school board and the district court (Pet. App. D-4).

Petitioners speculate about a denial of due process in the future if the district court enters an order on the basis of the bi-racial committee's recommendation. But their due process claim can be raised in an appeal if such an order is entered and therefore is not a matter appropriate for mandamus or prohibition. *Roche* v. *Evaporated Milk Association*, *supra*; *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 547.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari and alternative petition for a writ of mandamus and/or prohibition should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DAVID L. NORMAN,
Assistant Attorney General.

JOSEPH D. RICH,
Attorney.

JUNE 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 466958 704